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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-379

PAUL POMPONIO and PETER POMPONIO, *Petitioners*

v.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioner prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered on June 3, 1975, Petition for Re-hearing was denied on August 15, 1975.

CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unreported and is attached to this Petition (Petitioners' Appendix 1a-6a). The Order denying the Petition for re-hearing and Re-hearing En Banc is attached (Petitioners' Appendix 6a-7a).

JURISDICTION

The Judgment of the United States Court of Appeals for the Fourth Circuit was entered on June 3, 1975 and Petition for Rehearing was denied on August 15, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I. SHOULD NOT THIS COURT GRANT CERTIORARI AND REMAND THIS CAUSE TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT WITH DIRECTIONS TO CONSIDER AND DETERMINE PETITIONERS' APPEAL ADDRESSED TO THAT COURT THAT THE EVIDENCE INTRODUCED BY THE GOVERNMENT ON COUNT IV OF THE INDICTMENT (the only Count on which the Petitioners stand convicted) WAS INSUFFICIENT AS A MATTER OF LAW REQUIRING A JUDGMENT OF ACQUITTAL AND DOES NOT THE FAILURE OF THE COURT OF APPEALS TO DECIDE THIS ISSUE SUBJECT THE PETITIONERS TO A RETRIAL OF THIS COUNT IN VIOLATION OF THEIR CONSTITUTIONAL RIGHTS AGAINST DOUBLE JEOPARDY?

II. DID NOT THE FAILURE OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT TO CONSIDER THE PETITIONERS' ARGUMENT THAT THE EVIDENCE INTRODUCED BY THE GOVERNMENT IN SUPPORT OF COUNT IV OF THE INDICTMENT CONSTITUTED A FATAL VARIANCE FROM THE INDICTMENT AS DRAWN, DENY THE PETITIONERS DUE PROCESS OF LAW AND SUBJECT THE PETITIONERS TO DOUBLE JEOPARDY BY A RETRIAL OF THIS COUNT?

STATUTES AND RULES INVOLVED

Rule 29. Motion for Judgment of Acquittal.

(a) *Motion Before Submission to Jury.* Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

Fifth Amendment to the Constitution.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 § 2106. Determination.

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate

judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances, June 25, 1948, c. 646, 62 Stat. 963.

18 § 2314. Transportation of Stolen Goods, Securities, Moneys, Fraudulent State Tax Stamps, or Articles Used in Counterfeiting.

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any persn to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or * * *

STATEMENT OF THE CASE

The Petitioners, Paul Pomponio and Peter Pomponio, were indicted and tried on a 5-count indictment with two other codefendants Louis Pomponio and Charles J. Piluso (Petitioners' Appendix 7a-21a). Count I* of the indictment charged a general scheme to defraud, named the Petitioners and the other co-defendants as general participants in an overall scheme to defraud with the implementation of the mails in furtherance of the scheme. This Count, which involved

* Counts in the original indictment were dropped and renumbered. The only count involved in this petition is old count II which became count IV.

all of the defendants, accounted for ninety percent of the evidence that was offered at the trial. This Count was dismissed by the trial judge as to both Petitioners when the jury failed to agree on this Count as to the Petitioners Paul Pomponio and Peter Pomponio. Count II of the indictment charged the Petitioners and the other two defendants with violating Title 18, Section 2314, of the United States Code by causing one Albert Ginsberg to travel in interstate commerce in furtherance of the scheme to defraud which was outlined in Count I and which was incorporated by reference in Count II. The jury acquitted both Petitioners, Paul Pomponio and Peter Pomponio, on this Count.

The third Count of the indictment also incorporated the scheme to defraud alleged in Count I and charged a violation of Title 18, Section 1343, asserting that the Petitioners and co-defendants used the phone in furtherance of the scheme to defraud. The Petitioners Paul Pomponio and Peter Pomponio were likewise acquitted by the jury on this Count also.

Count IV of the indictment (old Count XI, the only Count on which the Petitioners stand guilty) charged the Petitioners Paul Pomponio and Peter Pomponio and the other two defendants with interstate transportation of a security, a two million dollar check, obtained by fraud in violation of Title 18, Section 2314 of the United States Code. The jury convicted both Petitioners under this Count.[1] The co-defendants Louis J. Pomponio and Charles J. Piluso were convicted on all Counts.

The Petitioners Paul Pomponio and Peter Pomponio moved pursuant to rule 29 of the Federal Rules of

[1] The jury convicted the Petitioners on the Fifth Count also but the United States Court of Appeals dismissed this Count of the indictment for failure to charge an offense.

Criminal Procedure for a judgment of acquittal and re-argued in the Court of Appeals that the evidence offered on Count IV of the indictment required a judgment of acquittal as to the Petitioners. The Petitioners further charged that the evidence offered by the Government in support of Count IV of the indictment constituted a prejudicial variance from the charges as set forth in Count IV of the indictment. The United States Court of Appeals for the Fourth Circuit reversed the conviction of all the defendants for the failure of the trial judge to make requested inquiries of the jury concerning prejudicial newspaper articles that appeared during the course of the trial and the Court of Appeals expressly declined to consider the Petitioners' appeal to that Court that the evidence on Count IV was insufficient to submit to the jury and that the evidence as offered constituted a fatal variance from the indictment as drawn.[2] Petition for Rehearing was timely filed and denied on August 15, 1975. This Petition follows.

I

REASONS WHY THE WRIT SHOULD BE GRANTED

The Refusal of the United States Court of Appeals for the Fourth Circuit To Review and Pass on the Legal Sufficiency of the Evidence as to the Petitioners Paul Pomponio and Peter Pomponio on Count IV of the Indictment, the Only Count on Which They Stand Convicted, Subjects the Petitioners to a Re-trial of Count IV, Violates Their Constitutional Rights Against Double Jeopardy and Fails To Fulfill the Statutory Duty Imposed on the Court of Appeals Under Title 28, Section 2106 of the United States Code.

The Petitioners moved for a judgment of acquittal at the close of the Government's case and after they

[2] The other defendants who were convicted on all counts did not challenge the sufficiency of the evidence.

rested their own case in the trial court. The Petitioners raised in the United States Court of Appeals for the Fourth Circuit as their main point of appeal that there was insufficient evidence on Count IV to submit to the jury.

The United States Court of Appeals for the Fourth Circuit awarded the Petitioners and the co-defendants a new trial and stated (Pet. App. 2a):

> "The Defendants raise numerous issues, including newspaper publicity during the trial prejudicing the jury and the insufficiency of the indictment on Count V. Since we reverse and remand for a new trial on the basis of the failure of the District Court to inquire of the jury concerning prejudicial publicity during the trial which may have reached them, we reach none of the multitude of other issues raised except the sufficiency of Count V of the indictment."

(Among the "multitude of other issues" was the single and main issue of the Petitioners Paul Pomponio and Peter Pomponio that they were entitled to a judgment of acquittal on Count IV due to the legal insufficiency of the evidence as to them on this Count. Count V which was referred to by the Court of Appeals was dismissed by that Court for failure to charge an offense.)

We suggest to this Court that the refusal of the United States Court of Appeals for the Fourth Circuit to address itself to the argument of the Petitioners that there was legally insufficient evidence to submit to the jury on Count IV, the only count on which the Petitioners were convicted, and their action in awarding a new trial to the Petitioners and the other co-defendants

who were convicted on all counts, subjects the Petitioners to a re-trial on Count IV in violation of their constitutional rights against double jeopardy.

The decision of the United States Court of Appeals is also contrary to the statutory obligation imposed on the United States Court of Appeals by Title 28, Section 2106 to pass upon legal issues which have been duly preserved in the trial court and which are raised on appeal to the Circuit Court of Appeals. The decision is in conflict with the recent decision of the United States Court of Appeals for the District of Columbia Circuit in *The United States* v. *Wiley,* decided August 22, 1975, Nos. 74-1471, 74-2119. In *The United States* v. *Wiley,* the United States Court of Appeals for the District of Columbia Circuit stated with respect to the function of a reviewing court in passing on the correctness of the denial of a motion for judgment of acquittal:

> "The doctrine has roots in our 1963 decision in Cephus v. United States, 117 U.S. App. D.C. 15, 324 F. 2d 893. There we held that where, as here, the trial court denies a motion for judgment of acquittal, the accused is entitled to have the sufficiency of the Government's case-in-chief reviewed on appeal regardless of whether he subsequently put on a defense which filled in the hole in the prosecution's case."

The Court in the Wiley case also made the following statement with respect to Title 28, Section 2106:

> "In addition to constitutional commands, the federal appellate courts are governed in their decision-making by the statutory directive of 28 U.S.C. Sec. 2106 that they shall dispose of appeals in the in-

> terest of justice. This permits and indeed counsels protection of sound and substantial interests of the accused even when they do not rise to the level of constitutional protections."

The Petitioners' main argument in the United States Court of Appeals for the Fourth Circuit, which appeared in pages 18 through 47 in their brief, was that the record in this case contained absolutely no evidence as to the Petitioners Paul Pomponio and Peter Pomponio on Count IV of the indictment. The Petitioners set forth in their brief on that count that the Government witnesses who testified in the trial: Martha Lyons, (transcript 122-132), Robert Vasquez (transcript 132-135), Robert Sourci (transcript 135-136), A. Jack Conner (transcript 138-141), Maury Young (transcript 142-147), Carl Brett (transcript 152-157), John W. Underwood (transcript 164-170), Edward I. Wright, (transcript 174-176), Donald Beck (transcript 178-181), Joyce Potts (transcript 181-184), Raymond King (transcript 185-190), Venerando J. Caffo (transcript 193-204), Thomas Blackwell (transcript 206-213) and Donald White (transcript 232-235), offered no testimony against petitioners on Count IV.

The witnesses H. Burton Bates (transcript 246-448), Patricia McNabb (transcript 454-477), William Nihill (transcript 516-519), Sidney M. Zneimer (transcript 520-816), Doris Frankenfield (transcript 826-831), D. H. Bagley (transcript 834-837), George DiLello (transcript 846-851), Stephen Corriss (transcript 854-870), Billy Landreth (transcript 893-947), Robert Wills (transcript 947-960), Wayne Loving (transcript 960-969), offered no testimony against petitioners on Count IV.

The Government witnesses, George Delello (transcript 999-1003), Robert Griffin (transcript 1006-1023) and the witness William Althoff (transcript 1045-1071) gave no testimony as to the Petitioners Paul Pomponio and Peter Pomponio. In Count III the witness Jerome Murray (transcript 1093-1208), the witness whom the Government contended was defrauded, testified that he had no contacts with the Petitioners. The same is true of the witness Albert Ginsberg, (transcript 1245-1315). The Government witness Charles Zalaznick (transcript 1213-1228) gave testimony with respect to Count V, which was dismissed by the Court of Appeals.

The witnesses who gave any testimony with respect to Count IV, John McShain (transcript 1325-1354), Warren Spaulding (transcript 1330-1406) and Paul S. Fry (transcript 1407-1485) gave no testimony with respect to the Petitioners. The Government called Gregory Mallet-Prevost (transcript 1657-1666), who testified with respect to the deposit of the $2 million check which bore the endorsements of the Petitioners and the other co-defendants that he had no discussion or contact with the Petitioners with respect to the transaction. The final Government witness, Wayne Loving (transcript 1668-1676), an Internal Revenue Agent, gave no testimony with respect to Count IV.

It was urged in the Court of Appeals for the Fourth Circuit that there was no evidentiary basis on the facts to submit this Count to the jury as to the Petitioners Paul Pomponio and Peter Pomponio. The trial judge recognized this however but used as the justification for submitting this Count to the jury as

to the Petitioners that it was part of a common scheme when, *as a matter of law, the scheme outlined in Count I was not incorporated in Count IV as it was in Counts II and III* and therefore could not have formed a permissible basis for submitting Count IV to the jury as to these Petitioners.

These Petitioners, by the decision of the United States Court of Appeals for the Fourth Circuit, *are being subjected to a second trial, to a second jeopardy, without having the benefit of a ruling by the United States Court of Appeals for the Fourth Circuit on the correctness of the Petitioners' contention that there was legally insufficient evidence to submit to the jury on Count IV.*

The doctrine against retrials is the core of the double jeopardy clause of the Constitution, *Bree* v. *Jones,* — U.S. —, 95 S.Ct. 1779, 44 Lawyers Edition 2nd (1975); *U.S.* v. *Jenkins,* — U.S. —, —, 95 S.Ct. 1006, 43 L.Ed. 350 (1975); *U.S.* v. *Wilson,* — U.S. —, 95 S.Ct. 1013, 43 Lawyers Edition 232 (1975); *U.S.* v. *Jorn,* 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed. 2d 543 (1971); *North Carolina* v. *Pearce,* 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969); *Green* v. *United States,* 355 U.S. 184, 78 Sup. Ct. 221, 2 L.Ed. 2d 199 (1957). One of the few exceptions to the Constitutional prohibition against multiple prosecution occurs when the accused appeals his conviction and is awarded a new trial. This Court has ruled that retrials following appellate reversal of criminal conviction do not violate the double jeopardy clause in the Constitution. See *U.S.* v. *Ball,* 163 U.S. 662, 16 S.Ct. 1192. This theory of waiver was extended by this Court in *Bryan* v. *U.S.,* 338 U.S. 552, 70 S.Ct. 317, 94 L.Ed. 335 (1950),

to appellate reversals for insufficient evidence. As the Court of Appeals stated in *U.S.* v. *Wiley:*

> "A defendant's attempt to obtain from an appellate court the acquittal which should have been entered by the trial judge cannot fairly or logically be deemed a relinquishment of double jeopardy protection or consent to a retrial."

See also Thompson Reversals for Insufficient Evidence: The Emerging Doctrine of Appellate Acquittal 8 Indiana Law Review 497 (1975). The effectiveness of this Court's ruling in *Bryan* v. *United States, supra,* has been thrown into some doubt as a result of this Court's decision in *Sapir* v. *United States,* 348 U.S. 373, 75 S.Ct. 422, 99 L.Ed. 426 (1955). In that case this Court vacated a judgment of the Tenth Circuit which permitted a new trial following reversal for insufficient evidence and reinstated an earlier judgment of that Court which had instructed the trial court to dismiss the indictment. This Court's order did not explain the rationale underlying its action. Justice Douglass's concurring opinion set forth his view that the double jeopardy clause prevented a retrial "when the appellate court orders a judgment of acquittal for lack of evidence" and distinguished *Bryan* v. *United States, supra,* on the ground that Petitioners' request for a new trial brought "different considerations * * * into play" and "the whole record for such judgment as might be just".

Subsequently this Court in *Forman* v. *United States,* 361 U.S. 416, 80 Sup. Ct. 481, explained that under 28 USC Section 2106 the Court of Appeals had full power to go beyond the particular relief sought in a case reversed on grounds of an improper instruction

but suggested that it did not have similar discretion in a case like Sapir "based on the insufficiency of the evidence and on which the Petitioner made no motion for a new trial".

Although this Court in *Bryan* v. *United States* did not rely upon State Court authority to support its decision, all of the State Courts which had considered the question by 1950 had found no constitutional infirmity in ordering a retrial after appellate determination of evidentiary insufficiency.[3]

The sole exception noted was New Mexico, which prohibited retrial. *State* v. *Moreno,* 60 N.M. 113, 364 Pacific 2d 594 (1961). Since the waiver doctrine in the *Bryan* case has been in effect overruled by this Court's decision in *Green* v. *U.S., supra,* the Petitioners should as a matter of law be entitled to have the Court of Appeals affirmatively rule on whether they were entitled to a judgment of acquittal or whether they were not entitled to a judgment of acquittal.

If this Court does not grant certiorari and direct the United States Court of Appeals for the Fourth Circuit to rule one way or another on the Petitioners' Motion for Judgment of Acquittal the Government, in addition to subjecting the Petitioners to double jeopardy by a retrial of this Count, would also be in the unfair position to attempt to cure the deficiency in the evidence introduced at the first trial by introducing additional testimony to cure the deficiency in proof

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[3] The States that had decided the issue prior to 1950 all permitted retrial. A survey in 1964 found all but one of the eleven states with reported decisions in accord with Bryan. See Comment, Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence, 31 University of Chicago Law Review 365 (1964).

that occurred at the first trial when the Government neglected to introduce testimony from officials of the Continental Bank of Philadelphia to the effect that they would not have loaned the $2 million to the Petitioners and the co-defendants without the endorsement of McShane on the note.

While the recent case of *United States* v. *Wiley, supra,* has announced the proposition that on a retrial the Government may not introduce additional evidence (the opinion points out the conflict in the circuits on this issue) the Petitioners should not be put in this dilemma by the inaction of the United States Court of Appeals for the Fourth Circuit in not passing upon the legal sufficiency of the evidence on Count IV. We call the Court's attention to the footnote in *U.S.* v. *Wiley* where the United States Court of Appeals for the District of Columbia Circuit stated:

> "We have carefully considered the approach employed in these and numerous similar cases and conclude that *in general it is not in the interest of justice to accord the prosecution more than one fair opportunity to present a prima facie case against a criminal defendant. To do so would enable the prosecution to utilize evidence presented by the defense to build a prima facie case at retrial and to correct tactical mistakes in order to enhance the prospects of obtaining and sustaining conviction.* Moreover, confining the Government to a single prosecution furthers sound judicial administration by creating incentives for thorough preparation and careful presentation of the Government's case. These considerations coupled with the policy against multiple prosecutions, the policy underlying Rule 29, and the interest in avoiding disparate treatment of similarly situated defendants (see note 35 supra) outweigh the Government's interest in obtaining convictions.

> Our approach is comparable to that taken in some prior circuit court opinions. See, e.g., *United States* v. *Bass,* 490 F2d 846, 852-53 (5th Cir. 1974) (ruled district judge may refuse to permit a retrial "if he finds from the record that the prosecution had the opportunity to develop its case * * * at the first trial"); *United States* v. *Smith,* 437 F2d 538, 542 (6th Cir. 1970) (retrial "hinges, in our view, on whether the Government was unfairly prevented from producing competent evidence"); *United States* v. *Howard,* 432 F2d 1188, 1191 (9th Cir. 1970) (concurring opinion of Ely, J., in which Hufstedler, J., joined) (where the prosecution "had the opportunity fully to develop is case, or, in fact, did so" and "[i]f it did, or if it appears that it was responsible for its failure adequately so to do, then it is not ordinarily fair that the successful appellant should be required to undergo another trial").

Therefore, in light of the above, this Court should grant the Petition for Certiorari requested by Petitioners.

II

The Failure of the United States Court of Appeals for the Fourth Circuit To Rule on Petitioners' Contentions in that Court that the Evidence Offered by the Government in Support of Count IV Constituted a Constitutional Variance from the Indictment as Framed, Deprived the Petitioners of Due Process of Law.

The Petitioners were charged in Count IV of the indictment of fraud in inducing the Continental Bank of Philadelphia of transporting in Interstate Commerce a two million dollar check. The Government offered no evidence of false representation by anyone to the officials of the Continental Bank. The Government proceeded to introduce what they contended were

false representations to one John McShane who endorsed the note to the Bank. No testimony was offered that the Bank issued the check because of McShane's endorsement.

What is crystal clear in the present case is that the Petitioners raised in the United States Court of Appeals for the Fourth Circuit that the Government evidence in support of Count IV constituted a prejudicial variance under this Court's ruling in *Stirone* v. *United States,* 361 U.S. 12. Appellants urged in Point 3 of their Brief in the United States Court of Appeals, Pages 48 through 58, that the Government failed to introduce into evidence testimony that the Continental Bank of Philadelphia would not have loaned the $2 million to the Petitioners if they did not have McShane's endorsement on the note which was signed by the Petitioners. The indictment in this case did not charge the Petitioners with procuring McShane's endorsement on the note and thereby obtaining from the Continental Bank of Philadelphia of the $2 million check by fraud, but rather charged them with obtaining the $2 million check by fraud. In *Stirone* v. *United States, supra,* this Court stated:

> The Bain case, which has never been disapproved, stands for the rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him. See, also *United States* v. *Norris,* 281 U.S. 619, 622, 50 S.Ct. 424, 425, 74 L.Ed. 1076; *Cf. Clyatt* v. *United States,* 197 U.S. 207, 219, 220, 25 S.Ct. 429, 431, 432, 49 L.Ed. 726.

The Petitioners urged in the United States Court of Appeals for the Fourth Circuit that since no evidence was offered by the Government to establish that the

Continental Bank would not have issued the $2 million check to the Petitioners and the other defendants predicated on their own endorsements on the note and would have required the endorsement of John McShane before approving the loan there was not only a failure of proof but under the Government evidence introduced there was a prejudicial variance from the indictment as framed.

The opinion of the United States Court of Appeals for the Fourth Circuit which granted a new trial as to all defendants, (the two other defendants being involved in other Counts, including Count IV), has prejudicially subjected these Petitioners to a retrial on a single Count without having the benefit of the ruling of the United States Court of Appeals for the Fourth Circuit as to whether, in fact, the Government evidence offered in support of Count IV constituted a prejudicial variance from the indictment. This Court should grant the writ of certiorari.

CONCLUSION

This Petition presents two issues of constitutional dimension which are interrelated. The refusal of the United States Court of Appeals for the Fourth Circuit to rule on the legal sufficiency of Count IV as to these Petitioners, not only has subjected these Petitioners to a retrial of this Count in violation of the double jeopardy provisions of the Fifth Amendment, but has also subjected these Petitioners to a retrial with co-defendants who are indicted on multiple counts, including Count IV, which further enures to the Petitioners' prejudice.

The refusal of the United States Court of Appeals for the Fourth Circuit to rule on whether there was a

prejudicial variance from the indictment in the prosecution of Count IV, and their general reversal ordering a new trial as to Petitioners and all co-defendants, has not only denied the Petitioners due process of law but has afforded to the Government an opportunity to cure deficiencies in evidence which occurred at the first trial of Count IV and which was duly raised in the United States Court of Appeals for the Fourth Circuit. This also violates the Petitioners' constitutional rights against being put in double jeopardy as argued in Point I of this Petition.

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-1690

UNITED STATES OF AMERICA

Appellee

v.

LOUIS J. POMPONIO, JR., PETER POMPONIO, PAUL POMPONIO, CHARLES PILUSO

Appellants

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Oren R. Lewis, District Judge.

Argued January 9, 1975 Decided June 3, 1975

Before RUSSELL, FIELD, and WIDENER, Circuit Judges

Albert J. Ahern, Jr., for Appellants Peter Pomponio and Paul Pomponio; Alan Y. Cole (Lee A. Schutzman and Cole and Groner on brief) for Appellants Louis J. Pomponio, Jr., and Charles J. Piluso; Thomas K. Moore, Assistant United States Attorney (David H. Hopkins, United States Attorney, Frank W. Dunham and Justin W. Williams, Assistant United States Attorneys, on brief) for Appellee.

WIDENER, Circuit Judge:

Peter, Paul, and Louis Pomponio are brothers who were business associates involved in the development, construction, and operation of high-rise office and apartment buildings in the District of Columbia-Northern Virginia area. Charles Piluso was their attorney. The four were indicted on September 24, 1973 on several counts of fraud and conspiracy to commit fraud. The indictment was superseded by another Grand Jury indictment on November 13, 1973. As required by the trial court and prior to trial,

the government dropped four counts. The case went to trial on January 21, 1974. At the close of the government's case, the court merged various counts and renumbered them. Count 1 charged mail fraud in violation of 18 USC § 1341; count 2 charged that the defendants caused a victim to travel interstate in execution of a scheme to defraud him in violation of 18 USC § 2314; count 3 charged that the defendants used telephone communication in interstate commerce in executing the scheme to defraud in violation of 18 USC § 1343; count 4 charged interstate transportation of a security obtained by fraud in violation of 18 USC § 2314; and count 5 charged interstate transportation of counterfeit securities in violation of 18 USC § 2314.

Defendants Piluso and Louis Pomponio were convicted on all five counts. Defendants Peter Pomponio and Paul Pomponio were found guilty of counts 4 and 5, found not guilty on counts 2 and 3; and the jury hung on count 1, which was then dismissed by the court as to Peter and Paul Pomponio.

The defendants raise numerous issues, including newspaper publicity during the trial prejudicing the jury, and insufficiency of the indictment on count 5. Since we reverse and remand for a new trial on the basis of the failure of the district court to inquire of the jury concerning prejudicial publicity during the trial which may have reached them, we reach none of the multitude of other issues raised except the sufficiency of count 5 of the indictment.

The defendants were businessmen in the area who had been involved in several large building projects, and the collapse of their considerable businesses amid charges of fraud attracted publicity in the press. As might be supposed, as this trial progressed, articles appeared on a regular basis reporting its progress, two of which are in issue here. The jury was not sequestered during the

trial, but were instructed each evening before they left for the night to read, listen, or look at nothing concerning the case outside the courtroom.

On January 24, 1974, an article appeared in *The Washington Post* which had a headline stating "Rent Signatures Held Forgery" and a smaller headline stating "U.S. Official Testifies Against Pomponios." The body of the article contained information that was not available to the jury in court. It disclosed that the current trial was for only the first 10 of 113 counts against the Pomponios stemming from the disintegration of their conglomerate "in 1972 under tax and money manipulation investigations." It also reproduced a comment by a "court officer" who "apparently bored by the lengthy arguments over the fine legal points, grumbled afterward, 'You'd think they were trying Al Capone'."

On the morning the article appeared, the attorneys presented it to the court and requested that the court inquire of the jury as to whether they had read the article. The court refused the request on the basis that the jury had been admonished on the evening before and every evening not to read any such articles.

On January 30, 1974, the second article at issue appeared in *The Washington Post*. It was headlined "Spat Ends Pomponio Defense" and was continued on another page with the headline "Pomponio Defense Rests as Two Refuse to Testify." The article contained an account of some testimony and facts surrounding the defendants. More importantly, it had an account of events that occurred in the courtroom while the jury was absent. The article related that the attorneys for defendants Peter and Paul Pomponio requested that defendants Piluso and Louis Pomponio be called as witnesses, and that they had refused. It also contained an abbreviated account of an exchange between the court and counsel.

On the morning this second article appeared, the defense lawyers presented it to the court and asked that the jury be polled to determine whether any of them had read the article. Again, the court refused.[1]

The defendants argue that both articles were prejudicial in nature and that there was an obvious possibility that the jury had read them. They argue that it was error for the court not to question the jury as to those articles brought to the court's attention. We agree. *United States* v. *Hankish,* 502 F.2d 71 (4th Cir. 1974).

The articles dealt with matters that could not have been raised before the jury. The refusal to testify of two of the defendants on the request of the other two was not a proper matter to bring to the jury's attention. *Griffin* v. *California,* 380 US 609 (1965). The existence and number of other pending charges could not have been raised even if the defendants had chosen to take the stand. *United States* v. *Pennix,* 313 F.2d 524 (4th Cir. 1963). See *Lovely* v. *United States,* 169 F.2d 386 (4th Cir. 1948). We express no opinion on the comparison of this trial to that of Capone, but note that the statement read in context probably expresses merely the thought that there was an uncalled for overemphasis on the importance of the proceeding. Information denied the jury in the courtroom due to its prejudicial nature is still prejudicial although it may reach the jury through news accounts. *Marshall* v. *United States,* 360 US 310 (1959).

The district court did not find that the articles were not prejudicial. Rather, it relied on its admonitions to the jury to refrain from reading any articles concerning the trial

[1] There was apparently a third article that the defense wanted the court to inquire about. The request took place in chambers off the record, but the record does reflect that the court may have refused it. Since no attempt was made to place that article in the record, we do not consider whether the denial, if any, was proper.

of the defendants. While we agree that a jury is presumed to follow the court's instructions, when "highly prejudicial information may have been exposed to the jury, the court must ascertain the extent and effect of the infection, and thereafter, in its sound discretion, take appropriate measures to assure a fair trial." *Hankish,* p. 77 . Such articles must be brought to the court's attention, as these were by the attorneys, to enable it to make an initial determination as to whether the information is in fact prejudicial, and, of course, nonprejudicial articles do not require such an inquiry to the jury by the court. See *United States* v. *Wenzel,* 311 F.2d 164, 170 (4th Cir. 1962), *Hankish,* p. 77. Here, however, both articles contained prejudicial matter which the jury had no right to consider. When they were brought to the attention of the district court, it should have inquired how many, if any, of the jurors had read them, and if any had, taken such further steps as are required by *Hankish.* Its failure so to do requires a new trial.

The defendants raise in this court for the first time the contention that count 5 [2] is fatally defective for failing to charge an offense under 18 USC § 2314. Specifically, they point out that it fails to allege "unlawful or fraudulent in-

[2] Count 5 (formerly count 13):

"THE GRAND JURY FURTHER CHARGES:

"That on or about the 22nd day of June, 1971, in the Eastern District of Virginia, Louis J. Pomponio, Jr., Peter Pomponio, Paul Pomponio, and Charles J. Piluso did transport and cause to be transported in interstate commerce from Arlington, Virginia to Philadelphia, Pennsylvania, falsely made, forged, altered and counterfeited securities, that is, Certificates Nos. 1, 2 and 3 of the Zachary Taylor Corporation certifying that as of the 5th day of January 1970, LOUIS J. POMPONIO, JR., PETER POMPONIO and PAUL POMPONIO, respectively, were each the owners of ten (10) fully-paid and unassessable shares of the capital stock of said corporation knowing the same to have been falsely made, forged, altered and counterfeited.

"(Violation of Title 18, United States Code, Sections 2314 and 2)"'

tent,"[3] citing *United States* v. *Beard,* 414 F.2d 1014 (3rd Cir. 1969).

When an indictment does not accurately and clearly allege all the ingredients of which the offense is composed, we have held it to be insufficient. *Hale* v. *United States,* 89 F.2d 578 (4th Cir. 1937). Since we reverse and remand this case for a new trial, and are of opinion that count 5 of the indictment is insufficient on its face, we do not reach the questions of whether the objection comes too late, or the defect was cured by instructions, and direct that count 5 of the indictment be dismissed without prejudice to the government to reindict and retry if it chooses. *United States* v. *Ball,* 163 US 662, 672 (1896); *Beard,* p. 1017.

REVERSED and REMANDED FOR A NEW TRIAL.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-1690

UNITED STATES OF AMERICA

Appellee

v.

LOUIS J. POMPONIO, JR., PETER POMPONIO, PAUL POMPONIO, CHARLES PILUSO

Appellants

Order

The United States has filed a petition for rehearing suggesting consideration en banc; the defendants Louis J. Pomponio and Charles Piluso have filed a petition for rehearing directed only to the panel; and the defendants

[3] "Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited. . . ." 18 USC § 2314.

Peter Pomponio and Paul Pomponio have filed a petition for rehearing directed only to the panel.

No member of the court has requested a poll of the court on the suggestion of the United States for en banc consideration.

We have considered the three petitions for rehearing and are of opinion they are without merit.

It is accordingly ADJUDGED and ORDERED that the petitions shall be, and the same hereby are, denied.

With the concurrences of Judge Russell and Judge Field.

T. H. EWAD (illegible)
For the Court

A True Copy, Teste:
WILLIAM K. SLATE, II, Clerk
By F. O. CHLORIE

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Criminal No. 303-73

UNITED STATES OF AMERICA

v.

LOUIS J. POMPONIO, JR., PETER POMPONIO, PAUL POMPONIO, CHARLES J. PILUSO

JULY 1972 SPECIAL TERM — At Alexandria

THE GRAND JURY CHARGES:

A. 1. That at all times material herein, LOUIS J. POMPONIO, JR., PETER POMPONIO and PAUL POMPONIO were brothers and developers, builders, owners and operators of high-rise office and apartment buildings in Northern Virginia and the District of Columbia, which they accomplished through a

network of closely-held family corporations, partnerships and other business entities and in association with CHARLES J. PILUSO, an attorney, all of whom sometimes referred to each other as "partners," which network is described as follows:

a. National Realty and Construction Company, Inc. (NR&CC) operated as the general contractor for constructing the buildings.

b. Art Electric Company, Inc., Atlantic Mechanical Contractors, Inc., Dynner Window Wall Corporation, K. M. Adams of Virginia, Inc., National Elevator Corporation, Rosslyn Construction Company, Inc. and Watson Equipment Company, Inc. were subcontractors through which National Realty and Construction Company, Inc. accomplished the construction of the buildings.

c. A & H Holding Corporation, Abingdon Realty Corporation, Alexandria Overlook Apartments, Inc., Casimir Pulaski Corporation, Chester Arthur Corporation, Chowning Development Corporation, Christopher Wrenn Corporation, Columbia Plaza Corporation, Donata Corporation, Federal Realty and Development Corporation, Franklin Pierce Corporation, Howard Detrick Corporation, James Buchanan Corporation, James Polk Corporation, Lynn Equipment Company, Inc., Martin Van Buren Corporation, Millard Fillmore Corporation, Mutual Investors, Inc., National Center Corporation, Rosslyn Development Company, Inc., Rutherford Hayes Corporation, Winfield Corporation and Zachary Taylor Corporation were land and building owning corporations which obtained the financing and contracted for the construction of the buildings.

d. Pomponio Brothers Realty and Construction Company, Inc. (PBR&CC) provided management and leasing services for the completed buildings, Commonwealth Parking Corporation serviced the parking facilities in the completed buildings, Pomponio Financial Corporation provided management services, such as, payment of executive salaries and providing automobiles and drivers for officers and executives, and Rosslyn Aviation Corporation provided the transportation services of a jet airplane to the said executives and officers.

e. Eastland Capital Corporation and Margate Capital Corporation were formed in 1962 and 1963, respectively and operated as Small Business Investment Companies (SBIC) until October 18, 1967 when they agreed to cease in all respects to operate as such and to change their corporate names to Eastland Corporation and Margate Corporation, respectively.

2. That at all times material herein, the Royal National Bank, New York, New York was a federally insured bank engaged, among other things, in making construction loans for large commercial projects, such as high-rise office buildings.

3. That Jerome S. Murray duing the times material herein was self-employed as an owner and developer of real estate in the Washington, D. C. Metropolitan Area.

4. That Albert Ginsberg at all times material herein was self-employed as a builder, owner and developer of office buildings and other real estate in New York and the Washington, D. C. Metropolitan Area.

5. That John McShain during the times material herein, was a builder, owner and developer of large real estate projects in Philadelphia, Pennsylvania, Washington, D. C. and elsewhere.

B. That from on or about the 14th day of November 1968 and continuing thereafter up ton and including the date of the return of this Indictment, within the Eastern District of Virginia and elsewhere, LOUIS J. POMPONIO, JR., PETER POMPONIO, PAUL POMPONIO and CHARLES J. PILUSO, herein named as defendants, knowingly, willfully and unlawfully devised and intended to devise a scheme and arti-

fice to defraud Royal National Bank of New York, Jerome S. Murray of Annapolis, Maryland, Albert Ginsberg of New York, John McShain of Philadelphia, Pennsylvania, Continental Bank & Trust Company of Philadelphia, Cabot, Cabot & Forbes Land Trust Company of Philadelphia, and others to the Grand Jury unknown, each and all of whom were members of and constituted that class of persons and firms (hereinafter referred to as "lenders and investors") who could be induced to provide money and property for use by corporations owned and controlled by the defendants and engaged in construction projects in Northern Virginia and the District of Columbia; and for obtaining money and property from said lenders and investors by means of false and fraudulent pretenses, representations and promises, which the defendants well knew would be and were false when made; which scheme and artifice to defraud and for obtaining money and property as aforesaid was in substance as follows:

1. The defendants, builders and owners of high-rise office buildings, established a self-contained and integrated organization of closely-held corporations, with separate companies set up to own and obtain financing from lenders and investors for their construction projects, to act as general contractors and subcontractors for these projects, and to manage and operate the completed projects.

2. It was a part of the said scheme and artifice that the defendants would and did use this family owned and controlled organization to facilitate the manipulation and diversion of money obtained from lenders and investors for one of the defendants' projects to other projects of the defendants and to the defendants personally, all for the personal use and benefit of the defendants.

3. It was a further part of the said scheme and artifice that the defendants would and did give as consideration and security for these loans or investments, in various combinations, deeds, leases, sale/leaseback commitments, notes

and deeds of trust on assets of certain of defendants' corporations, asignments of all of the defendants' stockholdings and pledges of the defendants as sole shareholders not to issue more stock or encumber transfer any of the assets of these certain corporations.

4. It was further part of the said scheme and artifice that the defendants would and did bribe and attempt to bribe fiduciaries of the lenders and investors with whom they were dealing by giving them automobiles, vacation trips and large payments, calling them variously "gifts" or "consulting fees."

5. It was a further part of the said scheme and artifice that the defendants, for the purpose of misleading and with the intent to mislead the lenders and investors, to persuade them to lend and invest funds in the defendants' projects and to lull them into false senses of security, would and did make and cause to be made false and fraudulent pretenses, representations and promises, well knowing at the time made that they would be and were false when made, including the following:

a. That the funds obtained would be used only for the specific project and purpose for which they were lent and invested.

b. That the asserted progress of construction of specific projects was greater than the actual progress.

c. That the stock the defendants assigned as security for these funds was all that was issued and outstanding and was free and clear of any encumbrances.

d. That the assets securing said funds by deeds of trust were not subject to any other liens, charges, encumbrances or security interests.

e. That the assets directly and indirectly securing said loans and investments were in fact owned by the defendants through one or more of their corporations.

f. That the defendants had certain commitments, including leases, from third parties, the proceeds of which could be used to pay off the loans and investments.

6. On or about June 11, 1971, in the Eastern District of Virginia, the defendants, LOUIS J. POMPONIO, JR., PETER POMPONIO, PAUL POMPONIO and CHARLES J. PILUSO, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by false and fraudulent pretenses, representations and promises, and attempting to do so, knowingly, willfully and unlawfully did place and cause to be placed in authorized depository for mail matter a letter addressed to Paul Fry, Secretary-Treasurer, John McShain, Inc., 17th and Spring Garden Streets, Philadelphia, Pennsylvania, from CHARLES J. PILUSO, 1925 N. Lynn Street, Arlington, Virginia, to be sent and delivered by the Post Office Department according to the directions thereon.

(Violation of Title 18, United States Code, Sections 1341 and 2).

COUNTS 2 THROUGH 5

THE GRAND JURY FURTHER CHARGES:

1. And realleges and incorporates by reference all the allegations of the First Count of this Indictment except those contained in the last paragraph thereof.

2. That on or about the dates hereinafter specified in Counts 2 through 5, in the Eastern District of Virginia, the defendants, LOUIS J. POMPONIO, JR., PETER POMPONIO, PAUL POMPONIO and CHARLES J. PILUSO, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by false and fraudulent pretenses, representations and promises and attempting to do so, knowingly, willfully and unlawfully did take and receive and cause to be taken and received from the mails letters which had been delivered by the Post Office Department and the Postal Service addressed as specified in Counts 2 through 5:

Count	Date	Addressee	Sender
2	4/3/69	Martin Van Buren Corp. 1925 N. Lynn Street Arlington, Virginia 22209	Royal National Bank New York, N. Y.
3	4/2/71	Charles J. Piluso 1925 N. Lynn Street Arlington, Virginia 22209	Charles Zalaznick New York, N. Y.
4	4/9/71	Rosslyn Development Co., Inc. 1925 N. Lynn Street Arlington, Virginia 22209	The First National Bank & Trust Co. of Ellenville Ellenville, N. Y. 12428
5	8/26/71	James Polk Corp. & Zachary Taylor Corp. c/o Louis J. Pomponio, Jr. Pomponio Bros. Realty & Construction Co., Inc. 1925 N. Lynn Street Arlington, Virginia 22209	Harold C. McKenna Cabot, Cabot & Forbes Land Trust 28 State Street Boston, Mass. 02100

(Violation of Title 18, United States Code, Sections 1341 and 2)

COUNT 6

THE GRAND JURY FURTHER CHARGES:

1. And realleges and incorporates by reference all the allegations of the First Count of this indictment except the last paragraph theerof.

2. That on or about the 15th day of August, 1972, in the Eastern District of Virginia, the defendants, LOUIS J. POMPONIO, JR., PETER POMPONIO, PAUL POMPONIO and CHARLES J. PILUSO, having devised and intending to devise the aforesaid scheme and artifice to defraud and for obtaining money by false and fraudulent pretenses, representations and promises, did cause to be transported and induce to travel in and to be transported in interstate commerce,

from Annapolis, Maryland to Arlington, Virginia, Jerome S. Murray in execution and concealment of the aforesaid scheme and artifice to defraud the said Jerome S. Murray of property having a value in excess of $5,000, that is, $3,534,800.

(Violation of Title 18, United States Code, Sections 2314 and 2)

COUNT 7

THE GRAND JURY FURTHER CHARGES:

1. And realleges and incorporates by reference all the allegations of Paragraphs A and B of the First Count of this indictment except the last paragraph thereof.

2. That on or about the 8th day of April 1971, the defendants, LOUIS J. POMPONIO, JR., PETER POMPONIO, PAUL POMPONIO, and CHARLES J. PILUSO, having devised and intending to devise the aforesaid scheme and artifice to defraud, and for obtaining money by false and fraudulent pretenses, representations and promises, did cause to be transported and induce to travel in and to be transported in interstate commerce Albert Ginsberg, to-wit: from New York, State of New York, to Arlington, Commonwealth of Virginia in execution of the aforesaid scheme and artifice to defraud the said Albert Ginsberg of property having a value in excess of $5,000, to-wit: $1,750,000.

(Violation of Title 18, United States Code, Sections 2314 and 2)

COUNTS 8 AND 9

THE GRAND JURY FURTHER CHARGES:

1. And realleges and incorporates by reference all the allegations of the First Count of this Indictment except those contained in the last paragraph thereof.

2. That on or about the dates hereinafter specified in Counts 8 and 9, in the Eastern District of Virginia, LOUIS

J. POMPONIO, JR., PETER POMPONIO, PAUL POMPONIO and CHARLES J. PILUSO, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining property and money by false and fraudulent pretenses, representations and promises, and attempting to do so did transmit and cause to be transmitted in interstate commerce by means of wire communications, that is, telephone communications, certain signs, signals and sounds between Arlington, Virginia and the cities and states specified in Counts 8 and 9:

Count	Date of Phone Call	City and State
7	June 13, 1971	Philadelphia, Pennsylvania
8	August 27, 1971	Boston, Massachusetts

(Violation of Title 18, United States Code, Sections 1343 and 2)

COUNT 10

THE GRAND JURY FURTHER CHARGES:

That on or about the 8th day of April, 1971, in the Eastern District of Virginia, LOUIS J. POMPONIO, JR., PETER POMPONIO, PAUL POMPONIO and CHARLES J. PILUSO did transport and cause to be transported in interstate commerce from Arlington, Virginia to New York, New York, securities and moneys of a value in excess of $5,000, to-wit: two checks, each dated April 7, 1971, each made payable to "Charles J. Piluso, Attorney" and each signed by Albert Ginsberg, one in the amount of $1,650,000 drawn on the account of Algin Management at the Royal National Bank of New York (No. 2485) and the other in the amount of $100,000 drawn on the account of Algin Management at the Chase Manhattan Bank (No. 1937), knowing the same to have been obtained by fraud.

(Violation of Title 18, United States Code, Sections 2314 and 2)

COUNT 11

THE GRAND JURY FURTHER CHARGES:

That on or about the 28th day of June 1971, in the Eastern District of Virginia, LOUIS J. POMPONIO, JR., PETER POMPONIO, PAUL POMPONIO and CHARLES J. PILUSO, did transport and cause to be transported in interstate commerce from Philadelphia, Pennsylvania to Arlington, Virginia, securities and moneys of a value in excess of $5,000, to-wit: a cashier's check, No. 408628, dated June 28, 1971 of the Continental Bank, Philadelphia, Pennsylvania, payable to LOUIS J. POMPONIO, JR., PETER POMPONIO and PAUL POMPONIO in the amount of $2,000,000 knowing the same to have been obtained by fraud.

(Violation of Title 18, United States Code, Sections 2314 and 2)

COUNT 12

THE GRAND JURY FURTHER CHARGES:

That on or about the 9th day of September, 1971, in the Eastern District of Virginia, LOUIS J. POMPONIO, JR., PETER POMPONIO, PAUL POMPONIO and CHARLES J. PILUSO, did transport and cause to be transported in interstate commerce from Boston, Massachusetts to Arlington, Virginia securities and moneys of a value in excess of $5,000, to-wit: a wire transfer in the amount of $3,900,000 from the account of Cabot, Cabot & Forbes Land Trust at the First National Bank of Boston to the account of Alexander Title Agency, Inc. at the Arlington, Virginia Branch of the American Bank (now known as the Bank of Virginia-Potomac), knowing that a substantial portion thereof had been obtained by fraud.

(Violation of Title 18, United States Code, Sections 2314 and 2)

COUNT 13

THE GRAND JURY FURTHER CHARGES:

That on or about the 22d day of June, 1971, in the Eastern District of Virginia, LOUIS J. POMPONIO, JR., PETER POMPONIO and CHARLES J. PILUSO, did transport and cause to be transported in interstate commerce from Arlington, Virginia to Philadelphia, Pennsylvania, falsely made, forged, altered and counterfeited securities, that is, Certificates Nos. 1, 2 and 3 of the Zachary Taylor Corporation certifying that as of the 5th day of January, 1970, LOUIS J. POMPONIO, JR., PETER POMPONIO and PAUL POMPONIO, respectively, were each the owners of ten (10) fully-paid and unassessable shares of the capital stock of said corporation, knowing the same to have been falsely made, forged, altered and counterfeited.

(Violation of Title 18, United States Code, Sections 2314 and 2)

COUNT 14

THE GRAND JURY FURTHER CHARGES:

That prior to November 14, 1968 and continuously thereafter until up to and including the date of the return of this Indictment, within the Eastern District of Virginia and elsewhere, LOUIS J. POMPONIO, JR., PETER POMPONIO, PAUL POMPONIO and CHARLES J. PILUSO, the defendants herein, willfully, knowlingly and unlawfully did combine, conspire, confederate and agree together with each other and with divers other persons to the Grand Jury unknown, to commit the following offenses against the United States:

1. To knowingly use the mails and cause the use of the mails in furtherance and execution of a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises in violation of Title 18, United States Code, Section 1341;

2. To knowingly transmit and cause to be transmitted by means of wire, radio and television communications in interstate commerce writings, signs, signals, pictures and sounds in furtherance and execution of a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises in violation of Title 18, United States Code, Section 1343;

3. To knowingly transport, cause to be transported and induce persons to travel in or to be transported in interstate commerce in furtherance, execution and concealment of a scheme and artifice to defraud those persons and for obtaining money and property from said persons having a value of $5,000 or more by means of false and fraudulent pretenses, representations and promises in violation of Title 18, United States Code, Section 2314, paragraph two:

4. To willfully transport and cause to be transported in interstate commerce securities of a value of $5,000 or more, each of said defendants well knowing at the time that said securities had been obtained by fraud in violation of Title 18, United States Code, Section 2314, paragraph one;

5. To unlawfully and with fraudulent intent transport and cause to be transported in interstate commerce falsely made, forged, altered and counterfeit securities, each of said defendants well knowing the same to have been falsely made, forged, altered and counterfeited in violation of Title 18, United States Code, Section 2314, paragraph three;

The aforesaid scheme and artifice, false pretenses, representations and promises, use of the mails, wire, radio and television communications, and interstate transportation of persons, of securities obtained by fraud and of falsely made, forged, altered and counterfeited securities are fully set forth and described in the previous Counts of this Indictment, which description is incorporated by reference and made a part of this Count as though more fully set forth and described herein.

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the defendants performed the following overt acts:

1. The said defendants did do and cause to be done the acts set forth in the preceding counts of this Indictment on the dates, at the places and in the manner therein set forth, all of which are incorporated herein by reference as though fully set forth and made a part hereof.

2. On or before October 19, 1970, CHARLES J. PILUSO represented to the Royal National Bank that the $2,700,000 loan to the Virginia Corporation was an "interim land loan" to acquire the 6th and D Land which would be consolidated into a construction loan for a greater amount, the entire proceeds of which were to be held in trust and used by Virginia solely to obtain the land and construct on it a building.

3. On or about October 21, 1970 the defendants paid $25,000 to Sidney M. Zneimer, the senior bank official at Royal National Bank handling the interim land loan.

4. From on or about October 21 through October 29, 1970, the defendants diverted and caused to be diverted approximately $1,377,000 of the $2,700,000 loan to The Virginia Corporation to other corporations of the defendants POMPONIO.

5. On or about November 6, 1970 and January 13, 1971, LOUIS J. POMPONIO, JR. filed and caused to be filed with Royal National Bank financial statements of The Virginia Corporation falsely representing that it owned the 6th and D Land free and clear, subject only to a mortgage note payable.

6. On or about April 8, 1971, LOUIS J. POMPONIO, JR., PETER POMPONIO, PAUL POMPONIO and CHARLES J. PILUSO executed an affidavit in which they swore that each was the

beneficial legal and record owner of twenty shares of the common capital stock of The Virginia Corporation and that there was no other outstanding or issued stock.

7. On or about April 8, 1971, PAUL POMPONIO certified under seal that there were then issued and outstanding only eighty shares of stock of The Virginia Corporation which were owned beneficially and of record twenty shares each by LOUIS J. POMPONIO, JR., PETER POMPONIO, PAUL POMPONIO and CHARLES J. PILUSO.

8. On or about April 8, 1971, the defendants would and did issue and cause to be issued duplicate capital stock certificates of Virginia Nos. 1, 2, 3 and 4, of twenty shares each issued to LOUIS J. POMPONIO, JR., PETER POMPONOI, CHARLES J. PILUSO and PAUL POMPONIO, respectively, and assigned them to PHB Associates.

9. On or about April 8, 1971, the defendants received from Albert Ginsberg two checks totalling $1,750,000 payable to "Charles J. Piluso, Attorney."

10. On or about April 9, 1971, CHARLES J. PILUSO deposited the $1,750,000 received from Ginsberg in the account of Rosslyn Development Corporation.

11. From on or about April 9 through April 13, 1971 the defendants caused Rosslyn Development Corporation to disburse $1,270,000 to other corporations of the defendants.

12. On or about June 22, 1971, the defendants POMPONIO assigned Commitment No. 2571 of Eastland Capital Corporation to John McShain.

13. On or about June 28, 1971 the defendants delivered to John McShain and his attorney, Warren Spalding, a pledge agreement executed under seal by LOUIS J. POMPONIO, JR., PETER POMPONIO, and PAUL POMPONIO as the sole shareholders of the Zachary Taylor Corporation warranting that the thirty shares they were assigning to John McShain constituted 100% of the issued and outstanding

capital stock of the Zachary Taylor Corporation, and duplicate capital stock certificates of Taylor, Nos. 1, 2 and 3.

14. On or about June 28, 1971 the defendants received a $2,000,000 treasurer's check from the Continental Bank and Trust Company of Philadelphia.

15. From on or about June 29 through about December 31, 1971, LOUIS J. POMPONIO, JR., PETER POMPONIO and CHARLES J. PILUSO used over $1,800,000 of the $2,000,000 obtained through John McShain for the construction, maintenance and repair of their homes.

16. On or about August 18, 1971, LOUIS J. POMPONIO, JR. submitted to Cabot, Cabot & Forbes Land Trust an affidavit certifying to the leasing of the Zachary Taylor Building.

17. On or about September 9, 1971, the defendants caused ACMI to convey the land under the Zachary Taylor Building to Cabot, Cabot & Forbes Land Trust.

(Violation of Title 18, United States Code, Section 371)

Supreme Court, U. S.
FILED
OCT 30 1975
MICHAEL RODAK, JR., CLERK

No. 75-379

In the Supreme Court of the United States

OCTOBER TERM, 1975

PAUL POMPONIO AND PETER POMPONIO,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-379

PAUL POMPONIO AND PETER POMPONIO,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners' convictions for interstate transportation of a fraudulently obtained security and of counterfeit securities were reversed on appeal. Petitioners contend that further review is warranted because the court of appeals did not reach their arguments that the evidence was insufficient to support their convictions and that it varied from the allegations contained in the indictment.

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioners were convicted of having transported interstate a fraudulently obtained check in the amount of $2,000,000 (Count IV) and counterfeit securities (Count V), in violation of 18 U.S.C.

2314.[1] Petitioners were each sentenced to two years' imprisonment. The court of appeals (Pet. App. 1a-6a) reversed the convictions of petitioners and their two co-defendants and remanded for a new trial because the trial court had not questioned the jurors concerning their possible exposure to prejudicial newspaper publicity that had appeared during the trial, as required in that circuit by *United States* v. *Hankish*, 502 F.2d 71 (C.A. 4).[2]

Petitioners now argue that the court of appeals should have reached the "main" contentions made by them with respect to Count IV of the indictment—that is, that the evidence relevant to the charge in Count IV was insufficient to support their convictions and that it varied from the allegations made therein.[3] Petitioners contend that the court of appeals, by declining to reach these issues, failed to meet its responsibilities under 28 U.S.C. 2106[4] and subjected them to retrial in potential violation of the constitutional prohibition against double jeopardy. These contentions are without merit.

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[1]Petitioners were acquitted of having caused a person to travel interstate in furtherance of a scheme to defraud him, in violation of 18 U.S.C. 2314 (Count II), and of having used an interstate communications facility in furtherance of a scheme to defraud, in violation of 18 U.S.C. 1343 (Count III); the jury was unable to reach a verdict with respect to petitioners on an additional count of the indictment (Count I), which was then dismissed as to them by the trial court. Co-defendants Charles Piluso and Louis J. Pomponio were convicted on all five counts (Pet. App. 2a).

[2]The court of appeals also held Count V insufficient on its face and dismissed it without prejudice (Pet. App. 5a-6a).

[3]Charles Piluso has not petitioned for a writ of certiorari. The petition filed by Louis J. Pomponio is pending in No. 75-413.

[4]28 U.S.C. 2106 provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Although petitioners argued the sufficiency of the evidence and variance issues at length in their brief in the court of appeals—along with a multitude of others issues—the opening argument in their brief was directed to the issue of prejudicial publicity. Because of assertedly prejudicial pretrial publicity, petitioners claimed that "the interests of justice require a new trial" (Brief on Appeal, at p. 17). The court of appeals agreed with the contentions made by petitioners' co-defendants (and not disavowed by petitioners) concerning the trial court's treatment of prejudicial publicity that had appeared during the trial, and it therefore reversed petitioners' convictions.

Having sought and been granted the reversal of their convictions and a new trial, petitioners had no absolute right to any further review of their other claims in the court of appeals. Even assuming for purposes of argument that either the Double Jeopardy Clause or a sound application of 28 U.S.C. 2106 would have foreclosed a retrial had the court of appeals concluded that the evidence adduced at the first trial was insufficient to sustain a conviction (see *United States* v. *Wiley*, 517 F. 2d 1212 (C.A.D.C.); but see *Bryan* v. *United States*, 338 U.S. 552), it does not follow that the court of appeals was obliged to determine the merits of petitioners' insufficiency or variance claims. The matter of which claims of error should be reviewed in connection with a reversal for a new trial is one for the exercise of sound discretion by the appellate court. Cf. *Forman* v. *United States*, 361 U.S. 416, 425-426.

The holding in *United States* v. *Wiley*, *supra*, is not to the contrary. Indeed, the *Wiley* court relied for its decision upon the exercise of the discretionary powers conferred by Section 2106; such discretion properly encompasses the selection of issues to be determined on appeal when a

conviction is being reversed.[5] The thrust of petitioners' contentions is to require appellate courts to consider sufficiency issues whenever they are raised, even if a new trial has been ordered on other grounds and the merits of the sufficiency claim depend upon the prior resolution of other issues. An inflexible rule such as that contended for by petitioners is not justified by the policies inherent in the Double Jeopardy Clause, nor is it consistent with the discretionary powers conferred by Section 2106.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[5]The court in *Wiley* was concerned only with the appropriateness of a retrial following the reversal of the defendant's conviction because of insufficient evidence. No issue was raised in that case concerning a variance between the offense charged and the evidence, and the court of appeals consequently did not discuss the appropriateness of a retrial following the reversal of a conviction because of an evidentiary variance. The court in *Wiley* assumed, moreover, that retrial following a reversal because of insufficient evidence would not offend the Double Jeopardy Clause (see *Bryan* v. *United States, supra,* 338 U.S. at 560; *United States* v. *Ball,* 163 U.S. 662, 672; cf. *United States* v. *Tateo,* 337 U.S. 463), and based its decision instead on Section 2106.

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